

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
United States Department of Justice, Federal)	RM-10865
Bureau of Investigation and Drug)	
Enforcement Administration)	
)	
Joint Petition for Rulemaking to Resolve)	
Various Outstanding Issues Concerning the)	
Implementation of the Communications)	
Assistance for Law Enforcement Act)	

**COMMENTS OF THE
UNITED POWER LINE COUNCIL**

The United Power Line Council ("UPLC") hereby submits its Comments on the Joint Petition for Expedited Rulemaking in the above-captioned proceeding.¹

The UPLC opposes the petition for rulemaking, which overreaches and raises issues that should be considered, if at all, as part of a rulemaking proceeding.

I. INTRODUCTION

The UPLC is an alliance of utilities and their technology and service provider partners to develop broadband over power line (BPL) solutions in North America. Its members include virtually every utility and technology company that is actively engaged in the development of BPL in the country. Many of these members have deployed BPL systems in various trials to determine its technical

¹ *Comments Sought on CALEA*, Public Notice, DA No. 04-700, released Mar. 12, 2004.

and economic viability. Some have deployed BPL on a commercial basis, but only very recently. These trials and commercial deployments have yielded encouraging results, and the UPLC is optimistic about the future of BPL. But, the BPL industry is nascent and the technology continues to develop.

II. Broadband Access and Broadband Telephony Services Should Not be Declared Subject to CALEA.

The petitioners assert that broadband access services and broadband telephony services are subject to CALEA's assistance requirements that apply to a "telecommunications carrier" as defined in Section 102(8). Although it is true that CALEA's definition of a telecommunications carrier does not rely on the definition of a "telecommunications carrier" that governs the Communications Act, the petitioners misread subsection 8(B) as an alternative definition and overemphasize the reference to "switching" in subsection 8(A) to assert that CALEA applies to broadband access and telephony.

Fairly read, CALEA only applies to a telecommunications carrier that is a common carrier "*and* includes a person or entity engaged in providing wire or electronic communication switching or transmission service to the extent that the Commission finds that such service is a replacement for a substantial portion of the local telephone exchange service, and that it is in the public interest to deem such a person or entity to be a telecommunications carrier for purposes of this title."² Subsection 8(B) is not an alternative definition for that provided in

² 47 U.S.C. 1001(8)(B)(ii) *emphasis added*.

subsection 8(A).³ It merely explains the scope of subsection (A) to include common carriers that the Commission finds are a replacement for a substantial portion of telephone exchange services.⁴ Congress made this clear when it emphasized the narrow scope of CALEA, explaining that “the only entities required to comply . . . are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders.”⁵

Unlike petitioners, Congress placed no emphasis whatsoever on “switching”. We can only speculate why Congress chose to include switching as part of the definition of a telecommunications carrier in CALEA, even though it is not included in the definition in the Communications Act. It is more likely that “switching” was intended as a term of limitation, designed to exclude carriers that did not provide such capability. On that point, Congress explained that “the bill is clear that telecommunications services that support the transport or switching of communications for private networks or for the sole purpose of interconnecting telecommunications carriers (these would include long distance carriage) need

³ Compare Joint Petition for Expedited Rulemaking, RM-10865, at 11 (filed Mar. 10, 2004) (“Joint Petition”)(stating that Section 102(8)(B) is “an alternative definition” to that provided under Section 102(8)(A)).

⁴ Accord, *Communications Assistance for Law Enforcement Act*, Second Report & Order, 15 FCC Rcd. 7105, 7111 at ¶11-12 (1999) (expressly providing that a telecommunications carrier generally is “any entity that holds itself out to serve the public indiscriminately in the provision of any telecommunications service” and finding that an entity is a telecommunications carrier subject to CALEA to the extent it offers [a customer or subscriber the ability to originate, terminate or direct communications]). Subsection B also explains that CMRS are included among the telecommunications carriers covered by CALEA.

⁵ H.R. Rep. No. 827(I), 103d Cong. 2d Sess., reprinted in 1994 U.S.C.C.A.N. 3489 (“House Report”).

not meet any wiretap standards.”⁶ Whatever the reason it was included in the definition, “switching” cannot bear the emphasis that the petitioners place upon it.

The fact that CALEA uses a different definition for a telecommunications carrier does not mean that the petitioners may ignore the definition of “telecommunications” under the Communications Act. That definition makes clear that telecommunications is traffic “without change in the form or content of the information sent and received.”⁷ Moreover, CALEA’s definition of information services is virtually identical to the definition of information services provided under the Communications Act.⁸ Information services are expressly excluded from the definition of a telecommunications carrier under CALEA.⁹

The Commission has declared that cable modem services are information services, and it has tentatively concluded that all wireline broadband Internet access services are also information services.¹⁰ To the extent that broadband

⁶ *Id.* (elaborating that PBXs, ATMS and all information services are excluded).

⁷ 47 U.S.C. §153(43).

⁸ 47 U.S.C. § 1001(8)(6)(C); *cf* 47 U.S.C. §253(20)(defining information service as the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service).

⁹ 47 U.S.C. § 1001(8)(C)(i). The definition also excludes any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General. See 47 U.S.C. § 1003(8)(C)(ii).

¹⁰ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities: Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings. Bell Operating Company Provision of Enhanced Services, 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) (“*Wireline Broadband NPRM*”); *Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002)(“*Cable Modem Declaratory Ruling and NPRM*”), *aff’d in part and vacated in part sub. nom., Brand X Internet*

services are ultimately defined as an information service under the Communications Act, those services would be excluded from CALEA. No other reading of CALEA is reasonable.

Meanwhile, the Commission has explained that broadband services such as DSL are only subject to CALEA insofar as the “facilities are used to provide both telecommunications and information services . . . in order to ensure the ability to surveil the telecommunications services,” not to surveil DSL. Furthermore, the Commission elaborated that “where an entity used its own [broadband platform] to distribute an information service only, the mere use of transmission facilities would not make the offering subject to CALEA as a telecommunications service.”¹¹ Neither the Commission nor Congress intended to suggest that broadband service providers must comply with CALEA just because they use telecommunications facilities.¹² Instead, Congress and the Commission only meant to prevent *carriers* from using their DSL offerings to avoid compliance.

Services v. FCC, 345 F.3d 1120 (9th Cir. 2003), *petition for rehearing denied*, Case No. 02-70518 (Mar. 31, 2004).

¹¹ *Communications Assistance for Law Enforcement Act*, 15 FCC Rcd. at 7120, ¶27. *But see*, Joint Petition at 27, quoting House Report at 3498 (Congress specifically intended that “the transmission of [data communications such as] an E-mail message to an enhanced service provider that maintains the E-mail service [be] covered [by CALEA]”). Note that the context in which this excerpt from the House Report was drawn was a parenthetical statement made to assure privacy interests that email would in general *not* be subject to CALEA. In fact, Congress explained that CALEA includes provisions that restrict rather than enlarge the government’s current surveillance authority. See House Report at 3505.

¹² *But see* Joint Petition at 27-28 (claiming that broadband access providers are within the reach of CALEA because facilities used in the provision of information services remain subject to CALEA).

Even though broadband telephony provides some of the same functions as telecommunications, it certainly doesn't meet the statutory definition for "telecommunications" and is not by any means a replacement for local exchange services, let alone a substantial portion of the exchange market. There are still technical limitations with VoIP, such as 911 capability, which distinguish it from local exchange services. It is also questionable whether it can even be considered a local service at all.¹³ Just because carriers have announced plans to offer VoIP does not make it a local exchange service, nor is it necessarily a substitute for such services.¹⁴ Moreover, there are many different types of broadband telephony and various types of service providers.¹⁵ This is a technology that defies conventional definition.

Yet the petitioners presume that the Commission may issue a declaratory ruling in this proceeding. To the extent that the Commission should consider the relief sought in the Joint Petition, it must do so in the context of a full notice and comment rulemaking proceeding. A declaratory ruling on this issue would not be appropriate or necessary.¹⁶ There are at least three pending proceedings on

¹³ See e.g. *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d. 1, 9 (2000) (questioning whether calls to ISPs fit within "exchange access" or "telephone exchange service").

¹⁴ See *IP Enabled Services*, Notice of Proposed Rulemaking, WC Docket NO. 04-36, 2004 WL 439260 at ¶13 ("*IP Enabled Services NPRM*") (noting VoIP plans and service offerings by Time Warner, MCI, Sprint, AT&T, SBC, BellSouth and Verizon).

¹⁵ See *Id.* at ¶4 ("But VoIP services are not necessarily mere substitutes for traditional telephony services, because the new networks based on the Internet Protocol are, both technically and administratively different from the PSTN.") *Id.* at ¶ 10-22 (describing VoIP services offered by owners of transmission facilities, by other providers, and other new and future IP-enabled services.).

¹⁶ *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d at 9, citing *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (remanding FCC finding that ISP-bound traffic is local, emphasizing that it could not defer to the FCC because the agency had failed to make an adequate finding.) Similarly, the

issues related to the rules sought in the Joint Petition.¹⁷ Moreover, the importance of the rules sought requires that the public be provided additional notice and time to comment on those issues.¹⁸ Finally, the Commission has relied upon various rulemaking proceedings to implement CALEA generally, and the advent of VoIP should not alter that procedure.¹⁹

III. The Commission Should Not Require BPL Providers to Comply with CALEA At This Time.

The UPLC is very concerned that compliance with CALEA requirements would constitute an undue burden for BPL, which could impede the development of this nascent technology. As described at the outset, utilities are just beginning to deploy commercial systems in a few, isolated parts of the country. As such the cost of compliance with CALEA by BPL providers constitutes an undue burden that would not be justified by a commensurate benefit. Compliance would also necessarily have a disproportionate impact on BPL as compared with other broadband providers that have millions of customers and could

declaratory ruling sought by petitioners would not be entitled to any deference upon judicial review.

¹⁷ See e.g. *IP Enabled Services NPRM*, *Wireline Broadband Internet Access NPRM*, and *Cable Modem Declaratory Ruling and NPRM*.

¹⁸ The Administrative Procedure Act defines a “rule” as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. § 551(4). A rulemaking is defined as the “agency process for formulating, amending, or repealing a rule,” *id.* at § 551(5), and the Joint Petition most clearly seeks an amendment of the CALEA rules. Similarly, this is not an “interpretive rule” or “general statement of policy” that is exempt from the notice and comment requirements of § 553(b).

¹⁹ See e.g. *Communications Assistance for Law Enforcement Act*, Notice of Proposed Rulemaking, CC Docket No. 97-213, 13 FCC Rcd. 3149 (1997) and *Communications for Law Enforcement Act*, Further Notice of Proposed Rulemaking, CC Docket 97-213, 13 FCC Rcd 22632 (1998).

competitively disadvantage the service. The Commission should not add CALEA to the uphill task that BPL companies face to compete with other broadband service providers.

Assuming that a broadband provider even could be considered a “telecommunications carrier” under CALEA, the Commission would still need to find that the service is “a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to deem such [a provider] as a telecommunications carrier.”²⁰ For two reasons, the Commission should not find that any BPL provider is a telecommunications carrier at this time. First, BPL does not presently come close to representing a replacement for a substantial portion of the local telephone exchange service.²¹ Second, the public interest would not be served, if BPL were required to comply with CALEA.²² The Commission has recognized the potential for BPL to significantly advance its policy goals of universal broadband access and competition.²³ In order to ensure

²⁰ 47 U.S.C. § 1003(8)(B)(ii).

²¹ There are no more than a few thousand end-users in any one of the deployments in the U.S. at the present time, and most of the deployments are pre-commercial. Although we believe that number will increase now that commercial deployments are beginning to roll out, BPL cannot yet be considered a replacement for a substantial portion of the local exchange.

²² Owing to the fact that there are few end-users of BPL, compliance with CALEA would not substantially promote law enforcement. Moreover, the cost of compliance with CALEA could discourage the deployment of BPL systems altogether.

²³ *Carrier Current Systems, Including Broadband Over Power Line Systems*, Notice of Proposed Rule Making, ET Docket No. 03-47, 2004 WL 324486 at ¶30 (Because power lines reach virtually every home, school, and business in the United States, Access BPL technology could play an important role in providing high-speed Internet and broadband services to rural and remote areas of the country. Access BPL could also serve to provide new competition to existing broadband services, such as cable and DSL. In addition, Access BPL may allow electric utilities to improve the safety and efficiency of the electric power distribution system and also further our national homeland security by protecting this vital element of the U.S. critical infrastructure.”

that this potential is realized, the Commission must not require BPL providers to comply with CALEA.

IV. CONCLUSION

The UPLC recognizes the concerns raised by the petitioners and looks forward to working with them to ensure that federal, state and local law enforcement can effectively carry out critical electronic surveillance activities. Imposing CALEA compliance requirements on broadband access and broadband telephony providers is beyond the scope of the statute and is not necessary or appropriate to determine in a declaratory ruling. To the extent that the Commission proceeds at all with the Joint Petition, it should do so in a rulemaking proceeding, particularly in light of the pending proceedings on related issues. In any event, BPL providers must not be required to comply with CALEA, because it would not serve the public interest nor substantially advance the interests of law enforcement and could discourage the development of this nascent but promising broadband access platform.²⁴

Respectfully submitted,

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_____/s/_____
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²⁴ As the Commission recognized, services that are exempt from CALEA, such as private networks, can still be wiretapped pursuant to court order and their owners must cooperate when presented with a wiretap order, "but these services and systems do not have to be designed so as to comply with the capability requirements." *Communications Assistance for Law Enforcement Act*, Report & Order, CC Docket No. 97-213 15 FCC Rcd at 7112, ¶12.